

COPY

416

June 27, 1956

Louis C. Wyman, Attorney General

The Honorable Lane Drinell
Governor of New Hampshire
State House

NEW HAMPSHIRE LAW LIBRARY

SEP 22 1998

Dear Governor Drinell:

CONCORD, N.H.

Last month by interdepartmental memorandum, and oral permission to act upon the request at our convenience, you requested amplification of the opinion of this office to you of January 23, 1956, relative to the relationship between the Governor and Council in the conduct of the executive business of the State, with particular emphasis on the power of the Governor to exercise veto control in such matters.

The Governor of this State under the Constitution is the supreme executive magistrate (Const., Part II, Art. 41). The Constitution provides in Article 56 of Part II that no money shall be issued out of the State Treasury except by warrant of the Governor "by and with the advice and consent of the council." While RSA 9:16 provides, for example, that transfers may be made between allotments "by the comptroller upon the approval of the governor and council", this statutory limitation on the expenditure of the funds of the State cannot modify the constitutional prerogatives of the supreme executive magistrate, which constitutional enjoiner is that in all such cases the necessity is approval by the Governor and approval by a majority of the Council, a quorum of the Council being present.

In all such cases, failure of the Governor to approve withholds a part of approval which is constitutionally required and prevents effective action. It is inaccurate to describe such withholding of approval by the Governor as a "negative" because the Constitution itself uses this word in a special sense in Article 47 of Part II, as indicated in the second paragraph of the opinion to you of January 23, 1956.

Article 62 of Part II of the Constitution further provides:

" . . . And the governor shall have full power and authority to convene the council, from time to time, at his discretion; and, with them, or the majority of them, may and shall, from time to time hold a council, for ordering and directing the affairs of the state, according to the laws of the land."

COPY

The Honorable Lane Drinell -- 2.

From an examination of this Article, it is apparent that the Governor with the Council, or a majority of the Council a quorum being present, shall order and direct the affairs of the State of New Hampshire and that the Governor is indeed the separate supreme executive magistrate. Thus the Council itself cannot call a meeting and act without the Governor since the authority is given to the Governor to convene the Council by the Constitution. A legislative enactment could not modify this situation. It would require a constitutional amendment.

Once having convened the Council the Governor then has authority to determine the questions to be taken up inasmuch as he may at any time either withhold his approval or absent himself from such a meeting. As the Supreme Court of New Hampshire has recently said (98 N.H. 533) there may be situations where "approval of the Governor and Council" manifests a legislative intent that the Governor and Council should be called upon to act together as a single board. In view of the provisions of the Constitution relative to the convening and inter-relationship between the Governor and Council, it will require the clearest possible manifestation of legislative intention that the Governor and Council should in matters of approval of appointments be considered as called upon to act as a single body, inasmuch as such an interpretation relegates the Governor's status to a single vote against five others.

In view of the problems which may arise in connection with this matter I will try to have someone introduce legislation at the 1957 Session which will clarify the relationship between the Governor and Council where action by both is required. Such proposed legislation will be submitted in draft form to you for your approval prior to January of 1957.

Respectfully,

Louis C. Wyman
Attorney General

W/d

Authority of Governor and Council

The letters of Jan. 23, 1956 and May 25, 1956 from this office to the Governor dealt with matters of appointment and nomination and appointment and not with all the general powers of "governor and council." The supreme court decision of June 29, 1953, also had to do with appointment and, as I read it, did not necessarily apply to all cases where the words "governor and council " appear. For instance - RSA 9:16 provides that transfers may be made between allotments "by the comptroller upon the approval of the governor and council." This is a limitation on the expenditure of funds of the state. The governor is the supreme executive magistrate (Const. part 2 art. 41) and no money shall be issued out of the treasury but by warrant of the governor "by and with the advice and consent of the council." (Const. part 2, art. 56) Under these circumstances I cannot feel that RSA 9:16, for instance, should be construed as authorizing a transfer of allotment by vote of the governor and council acting as one body of six persons. It is my understanding that in such a case the governor must approve, and a majority of the council.

With reference to initiation of business by the Governor - the constitutional provision is that the governor has full power and authority "to convene the council, from time to time, at his discretion" and with the council, "or the majority of them, may and shall, from time to time hold a council for ordering and directing the affairs of the state." (Const. part 2, art. § 62)

I do not believe that the council can call a meeting and act without the governor since the authority is given to the governor to convene the council. Since he may convene the council he would have

authority to determine the questions to be taken up.

In view of the constitutional provisions I find it hard to find a situation where the council could adopt a resolution in which the governor did not agree, especially if an appropriation or expenditure of money were involved.

The question was also raised by the governor as to the approval of the appointment of assistant attorneys general.

RSA 7:16 "The attorney-general, subject to the approval of the governor and council, shall appoint three assistant attorneys-general" This comes within the cases cited in the Opinion of the Justices "In cases where appointment is to be made . . . by an official. . . 'subject to the approval of the Governor and Council ' . . . the Governor and Council may be called upon to act together as a single board, depending upon the intent of the particular statute." In this case the attorney general makes the appointment and it is possible that the governor ~~and~~ might not approve and the council might approve. I suppose in this case the appointment would be approved. However, as a practical matter, since the governor has the say as to the appointment of the attorney general I would not think the situation would often arise since ~~km~~ the attorney general would probably consult the governor prior to any appointment of an assistant.